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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BITA TRADING, INC.,

Plaintiff.

NATIONWIDE MUTUAL
INSURANCE COMPANY; ALLIED
INSURANCE,

Defendants.

CASE NO. 13cv1548 JM(WVG)

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

16 Defendant Nationwide Mutual Insurance Company (“Nationwide”), also
17 erroneously sued as Allied Insurance, moves for summary judgment on grounds that
18 Plaintiff’s claims are barred by the theft and entrustment provisions in the Commercial
19 Insurance Policy issued to Plaintiff Bita Trading, Inc. (“Bita”). Bita opposes the
20 Motion for Summary Judgment (“Motion”). For the reasons set forth below, the court
21 grants summary judgment in favor of Nationwide and against Bita and instructs the
22 Clerk of Court to close the file.

BACKGROUND

24 On May 24, 2013, Bita commenced this action in the California Superior Court,
25 County of San Diego, by filing a form complaint alleging a single cause of action for
26 breach of an insurance contract. On July 2, 2013 Nationwide removed the action to
27 this court based upon diversity jurisdiction. (Ct. Dkt. 1).

28 In this insurance coverage action, Bita originally sought coverage under two

1 different insurance policies issued by Nationwide. This first policy, issued to Sorrento
2 Mesa Hand Car Wash & Spa, Inc. (“Sorrento” and the “Sorrento Policy”), as set forth
3 in this court’s January 6, 2014 Order Denying Plaintiff’s Motion for Partial Summary
4 Judgment and Granting Defendant’s Motion for Summary Judgment, provided
5 coverage to Sorrento under the Property Form at issue, and to both Sorrento and Bita
6 under the Liability Form.¹ (Ct. Dkt. 25). As Bita’s claims arose solely under the
7 Property Form, and not the Liability Form, the court granted partial summary judgment
8 in favor of Nationwide and against Bita.

9 Bita's claims arise from the following generally described conduct. Bita owns
10 real property located on Mira Mesa Boulevard in San Diego, California. Effective
11 August 1, 2005, Bita entered into a 35-year Ground Lease with Sorrento for the
12 construction and operation of a car wash and related facilities. The car wash was built
13 in 2008 and operated through early 2012. Bita and Sorrento became involved in a
14 dispute over the property. On May 25, 2012, the Superior Court of San Diego County
15 terminated the lease, awarded monetary relief to Bita (in the amount of \$812,873), and
16 restored possession to Bita.² Bita asserts that Sorrento caused damage to the property
17 in the amount of \$750,000. (Ct. Dkt. 14-6; Sheena Decl. ¶7). Bita also represents that
18 only the car wash portion of the business opened on June 1, 2013, and that the
19 remaining portions of the operation, consisting of a convenience store, office and oil
20 change facility, have not been fully repaired and have not been fully placed in service.

21 Bita's claims under the Bita Commercial Policy, Nationwide policy No. ACP
22 CPP 7843309886, arise from damages to the property first discovered by Bita's
23 property managers, Brian Crepeau and Michele Torres, on June 29, 2012. Upon
24 unlocking and entering the building, the property managers discovered that fixtures and
25 property had been stolen and parts of the building damaged. As described in the San
26 Diego Police Department crime/incident report:

¹ The court incorporates that order as if fully set forth herein.

² On June 29, 2012, the Sheriff restored possession to Bita.

1 Building fixtures had been completely ripped out or off of the building's
2 exterior and interior. Electric wiring, metal piping, carpet, and ceiling
3 covers were missing. Three large rooftop air-conditioning units were
4 removed and stolen. Lighting fixtures, both inside and outside the
building were also stolen. Thousands of dollars in damage was done to
the building.

5 (Statement of Undisputed Material Fact ("UMF") Nos. 5, 7). There were no signs of
6 forced entry, no windows or doors were broken, and the Deputy Sheriff had to gain
7 access to the building by unlocking the door with a key provided by Sorrento. (UMF
8 Nos. 8 - 10).

9 Michele Torres reported the crime to the San Diego Police Department and a
10 report was prepared by Officer Bernard. Officer Bernard concluded that a burglary and
11 concurrent vandalism had occurred. Nobody was ever prosecuted for the crime. (UMF
12 11, 12).

13 On October 22, 2012, Bita submitted a sworn statement for a claim in the amount
14 of \$731,498 for a loss due to theft and vandalism. (UMF 4). The amount of the claim
15 included replacing the stolen items and repairing the damage to the building caused by
16 the removal of the items (including the removal of some of the car washing equipment).
17 On December 14, 2012, Nationwide denied the claim for that portion of the loss caused
18 by theft and/or dishonest acts of persons to whom the property was entrusted.
19 Nationwide did provide coverage for damage to the oil storage tanks on the property
20 as it considered such damage caused by vandalism, not related to the theft, as covered
21 within the Business Personal Property provision. (UMF 35).

22 By means of the present summary judgment motion, Nationwide argues that the
23 evidentiary record demonstrates that Bita's claims are barred by the theft and
24 entrustment provisions in the Commercial Policy. Bita opposes the motion.

25 DISCUSSION

26 Legal Standards

27 Motion for Summary Judgment Standards

28 A motion for summary judgment shall be granted where "there is no genuine

1 issue as to any material fact and . . . the moving party is entitled to judgment as a matter
 2 of law.” Fed. R. Civ. P. 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th
 3 Cir. 2005). The moving party bears the initial burden of informing the court of the
 4 basis for its motion and identifying those portions of the file which it believes
 5 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,
 6 477 U.S. 317, 323 (1986). There is “no express or implied requirement in Rule 56 that
 7 the moving party support its motion with affidavits or other similar materials negating
 8 the opponent’s claim.” Id. (emphasis in original). The opposing party cannot rest on
 9 the mere allegations or denials of a pleading, but must “go beyond the pleadings and
 10 by [the party’s] own affidavits, or by the ‘depositions, answers to interrogatories, and
 11 admissions on file’ designate ‘specific facts showing that there is a genuine issue for
 12 trial.’” Id. at 324 (citation omitted). The opposing party also may not rely solely on
 13 conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040,
 14 1045 (9th Cir. 1989).

15 The court must examine the evidence in the light most favorable to the non-
 16 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt
 17 as to the existence of any issue of material fact requires denial of the motion. Anderson
 18 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,
 19 when ““the moving party bears the burden of proof at trial, it must come forward with
 20 evidence which would entitle it to a directed verdict if the evidence were
 21 uncontested at trial.”” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
 22 (emphasis in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d
 23 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

24 General Insurance Law Principles

25 Ordinary rules of contract interpretation apply to insurance contracts. “The
 26 fundamental goal of contractual interpretation is to give effect to the mutual intention
 27 of the parties. If the contractual language is clear and explicit, it governs.” Bank of
 28 West v. Superior Court (Industrial Indemnity Co.), 2 Cal. 4th 1254 (1992). Where

1 exclusions are clear, plain, and conspicuous, they will be enforced. Malcolm v.
 2 Farmers New World Life Ins. Co., 4 Cal.App.4th 296, 3045 (1992).

3 **The Motion for Summary Judgment**

4 The Motion pertains to three different policy provisions: the coverage
 5 provisions, the Theft Exclusion, and the Entrustment Exclusion.

6 **The Coverage Provision**

7 The Bita Commercial Policy defines the scope of covered property in the
 8 following manner.

9 **A. Coverage**

10 We will pay for direct physical loss of or damage to Covered
 11 Property at the premises described in the Declarations
 caused by or resulted from any Covered Cause of Loss

12 **1 Covered Property**

13 Covered Property as used in this Coverage Part
 14 means the type of property described in this
 section **A 1**, and limited in **A 2**, Property Not
 15 Covered if a Limit of Insurance is shown in the
 Declarations for that type of property

16 **a Building**, meaning the building or
 17 structure described in the
 Declarations including

18 * * *

19 **b Your Business Personal**
 20 **Property** located in or on the
 building described in the
 21 Declarations or in the open (or in
 a vehicle) within 100 feet of the
 described premises consisting of
 22 the following unless otherwise
 specified in the Declarations or on
 the Your Business Personal
 23 Property - Separation of Coverage
 form

25 * * *

26 **2 Property Not Covered**

27 Bita construes the Coverage Provision to read that “property is ‘Not Covered’
 28 when a policy limit is shown.” (Oppo. at p.1:12-13). As no limit for building coverage

1 is included, Bita concludes that there is unlimited coverage for damage to the building.
 2 Seen in context of the Coverage Provision and the Declarations page, the court
 3 concludes that Bita's reading of this provision is unreasonable. While not a model of
 4 clarity, the court, citing policy language, construes this provision to mean that property
 5 is covered "if a Limit of Insurance is shown in the Declarations for that type of
 6 property (i.e. the building structure or business personal property as described in
 7 provisions A (1)(a) and (b) and excluded by A(2))." Turning to the Declarations page,
 8 coverage is available for Extra Expense and Business Personal Property. (NW 180).
 9 As building coverage is not identified in the Declarations Page, the court concludes
 10 that the Commercial Policy does not include such coverage.

11 In sum, Nationwide has shown that coverage is afforded for loss of Business
 12 Personal Property but not for the building.

13 The Theft Exclusion

14 The Bita Commercial Policy defines the Theft Exclusion in the following
 15 manner.

16 **THEFT EXCLUSION**

17 This endorsement modifies insurance provided under the following

18 **CAUSES OF LOSS SPECIAL FORM**

19 The following is added to the EXCLUSIONS section

20 **We will not pay for loss or damage caused by or resulting
 21 from theft**

22 But we will pay for:

- 23 1. Loss or damage that occurs due to looting at the
 time and place of a civil riot or commotion; or
- 24 2. Building damage caused by the breaking in or
 exiting of burglars.

25 (UMF No. 34).

26 The word "theft" is

27 used in insurance policies in [its] common and ordinary meaning. Theft
 28 involves the idea of a knowingly unlawful acquisition of property; that is,
 a felonious taking of it from one who has both the actual possession and

1 the apparent right of possession. In construing the word ‘theft’ it should
2 be given the usual meaning and understanding employed by persons in the
3 ordinary walks of life, and should be construed as common thought and
4 common speech now imagine and describe it. . . . It may well be that in a
5 prosecution for a crime, the strict rules of criminal law would require the
6 swindler to be charged with the particular crime that the facts constitute,
7 but it cannot be said that the contract of insurance was drawn to fit the
8 narrow limitations of criminal statutes.

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10 Granger v. New Jersey Ins. Co., 108 Cal.App. 290, 294-95 (1930). Nationwide has the
11 burden of proving the applicability of the Theft Exclusion. See Minkler v. Safeco Ins.
12 Co. Of America, 49 Cal.4th 315, 322 (2010).

13 To establish that the property was taken as a result of a theft, Nationwide must
14 first show that Sorrento did not have the right to the property taken by Sorrento. Upon
15 termination of the lease, which occurred on May 25, 2012, when the Superior Court of
16 San Diego County terminated the lease between Bita and Sorrento, Bita obtained title
17 to all improvements including “carpets, draperies, partitions, machinery, equipment and
18 fixtures.” (Ct. Dkt. 15-1 §8). The only other issue is whether the property was subject
19 to theft.

20 With respect to the theft of property, Nationwide comes forward with substantial
21 evidence to show that the property was unlawfully removed from the premises. After
22 Sorrento’s lease was terminated by the Superior Court of San Diego on May 25, 2012,
23 Bita’s property managers, Brian Crepeau and Michelle Torres, gained entry to the
24 property on June 29, 2012. The Deputy Sheriff, using the key obtained from Sorrento,
25 entered the property with the property managers to discover that fixtures, electric
26 wiring, metal piping, carpet, ceiling tiles, rooftop air conditioning units, and other
27 equipment had been removed from the premises. There were no signs of forced entry
28 to the property. Michele Torres reported the incident to the San Diego Police
Department and Officer Bernard, after investigation, concluded that a burglary and

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concurrent vandalism had occurred.³

2 Additional evidence supporting the theft of the personal property consists of the
3 insurance claim filed by Bita. Bita characterized the loss as "Vandalism - Theft."⁴
4 Moreover, at the deposition of Mr. Ahmad, he admitted that he removed and sold
5 numerous components of the car wash. The items removed included arches,
6 attachments, lights, six blowers, a water pump, a pressure washer, a computer, and
7 other items. Officer Bernard testified, from his personal observations of the property,
8 that he "was convinced that a burglary occurred based on the theft of several fixtures
9 and the air conditioning units." (Nationwide Exh. 6, 12:24 - 13:6).⁵ The evidence also
10 shows that Ahmad contacted Leonard Whatley, the principal of Eco Construction, and
11 informed him of a way to get some of the money back that Sorrento still owed Eco
12 Construction for electrical work performed on the car wash. Whatley met Ahmad at
13 the property and Ahmad advised Whatley that he had been evicted from the property
14 and that he was going to remove all of the personal property from the site. Whatley
15 observed Ahmad's employees removing some of the property. Ahmad also informed
16 Whatley that he had rented a storage unit to store the removed property. Ahmad
17 offered Whatley some of the items in exchange for monies owed to Eco Construction.

19 ³ Bita objects to a portion of the testimony of Michelle Torres. Bita provides no
20 context or argument as to these objections. At her deposition, Torres testified that she
21 suspected Sorrento of the damage and theft. (Nationwide Exh. 4, 19:13-33). Although
22 she testified that she did not have any proof, she suspected Sorrento was the
23 responsible party because, in part, the premises were locked and no windows or doors
24 were broken. Bita objects to the testimony based upon lack of personal knowledge and
hearsay. The court rejects these objections because, for the reasons elaborated at the
time of the depositions, the testimony consists of her impressions and conclusions
based upon the facts personally known by her. Further, the statements were made by
Bita's agents and properly considered authorized admissions as well as statements
against interest.

⁴ Bita objects to the statements “vandalism - theft” under FRE 602. This objection is not well taken because Bita itself made these statements and they constitute party admissions. See Rule 801(d)(2).

27 ⁵ Bita objects to this evidence on grounds of “Rule 602; hearsay.” Bita provides
28 no context or argument as to these objections. The court rejects these arguments as
Officer Bernard testifies as to his personal observations and based upon the statements
by Bita’s agents, Torres and Crepau.

1 Whatley declined the offer.⁶

2 Nationwide also identifies that the lease with the new tenant, Soapy Joe's,
 3 provided that the "Lessee acknowledges that the prior tenants removed certain
 4 improvements, equipment and fixtures from the Premises." (Exh. 11, section 2.2). The
 5 principal of Soapy Joe's informed the contractor performing repair work on the site that
 6 the prior tenant, Ahmad, had brought workers to remove everything from the property.
 7 (UMF 28).⁷

8 Bita also argues that Nationwide must both establish the identity of the actor and
 9 that the actor had criminal intent to remove the property. Under California law, the
 10 theft exclusion applies even if the actor is unknown and criminal intent not shown. See
 11 Granger v. New Jersey Ins. Co., 108 Cal.App. 290, 294-95. In Certain Underwriters
 12 at Lloyds London v. Law, 570 F.3d 574 (5th Cir. 2009), thieves climbed onto the roof
 13 to steal copper tubing. In the process, the thieves destroyed portions of exterior panels
 14 that housed air-conditioning equipment and broke the equipment to steal the tubing.
 15 The value of the stolen property was \$2,500 but the resulting damage was about
 16 \$200,000. The court concluded that the entire loss was excluded under the theft
 17 exclusion because "damage done in furtherance of a theft or attempted theft is damage
 18 that falls within the theft exclusion of the instant policy." Under these authorities, the
 19 theft exclusion would bar the claim for both the stolen property and damages to the
 20 building.

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22 ⁶ Bita objects to much of the Whatley testimony on grounds of Rule 602 and
 23 hearsay. With respect to the statements of Ahmad, as testified to by Whatley, Whatley,
 24 as a party to the conversations, possessed personal knowledge of the conversations.
 25 Further, many of the statements by Ahmad would be admissible as statements of his
 26 existing state of mind with respect to future actions he would undertake, as well as
 27 declarations against his interests, exposing him to civil and possible criminal liability.

28 ⁷ Bita objects to the lease it entered into with Soapy Joe's on the ground of lack
 29 of personal knowledge. The difficulty with this argument is that Bita's principal,
 30 Javanfar, authenticated the document and, moreover, signed and initiated the document.
 31 The court rejects the evidentiary objections to the lease between Bita and Soapy Joe's,
 32 although the lease has minimal probative value when compared to all the other
 33 evidence properly considered.

1 Bita argues that Ahmad only admitted to removing equipment and machinery
 2 components of the car wash and that Ahmad could have “mistakenly believed [the
 3 items] were trade fixtures he could remove under the lease.” (Oppo. at p.7:4-5).
 4 Ahmad denied any theft of the property. One difficulty with this argument is that Bita,
 5 through the express terms of the ground lease between Bita and Sorrento, obtained title
 6 to all improvements including “carpets, draperies, partitions, machinery, equipment and
 7 fixtures.” (Ct. Dkt. 15-1 §8). In other words, the removal of the components of the car
 8 wash, and the other identified equipment and personal property, was wrongful on the
 9 part of Ahmad and constitutes theft for purposes of the Theft Exclusion.

10 While the court concludes that the Theft Exclusion applies to bar Bita from
 11 recouping losses related to the theft of equipment, machinery, fixtures and personal
 12 property, and the concurrent damage to the building caused by the theft, incidents of
 13 vandalism present a distinct issue. Bita also argues that certain acts of vandalism are
 14 covered events. For example, someone poured sugar or another substance into the oil
 15 storage tanks. Nationwide paid for the damages to the tanks because it concluded that
 16 the damage was the result of vandalism, and not theft. The other act of vandalism
 17 identified by the parties is the damage caused by pouring thin-set cement into a drain
 18 or drains. The record does not establish whether Nationwide paid to repair this
 19 damage. In any event, acts of pure vandalism, that is, acts done solely to cause damage
 20 and do not involve damage caused by the removal of property, fall outside the Theft
 21 Exclusion.

22 In sum, the court grants summary judgment in favor of Nationwide and against
 23 Bita on the applicability of the Theft Exclusion. Damages to personal property or
 24 fixtures, and the resulting damage to the building related to the removal and theft of the
 25 personal property or fixtures, are not covered losses pursuant to the Theft Exclusion.

26 The Entrustment Exclusion

27 The Bita Commercial Policy defines the Entrustment Exclusion in the following
 28 manner:

B. Exclusions

2. We will not pay for loss or damage caused by or resulting from any of the following.

h. Dishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives, or anyone to whom you entrust the property for any purpose.

8 (UMF 32).

Nationwide argues that the Entrustment Exclusion applies to bar Bita’s claim. In Su v. New Century Ins. Services, Inc., 2013 WL 5775160 (C.D. Cal. 2013), the plaintiff purchased an “all-risk” insurance policy from New Century. The plaintiff leased the commercial property to the tenant. After a period of time, the tenant turned possession of the property back to plaintiff after it filed for bankruptcy. Water damage occurred to the property when an unidentified contractor removed climate control units from the roof because the tenant told the contractor that it could take the units as payment for work previously performed for the tenant. The plaintiff made a claim for the property damage and New Century argued that the claim was barred by the Entrustment Exclusion. On summary judgment, the district court concluded, in reliance upon California law, that the Entrustment Exclusion, similar to the one at issue in this case, “has been found to be unambiguous as a matter of law and specifically applicable to lessees.” Id. at *4 (citing Atlas Assurance Co. v. McCombs Corp., 146 Cal.App.3d 135, 144 (1983)). The court also noted that even if the damage was caused by vandalism and theft, “the entrustment exclusion applies to any such acts performed by anyone to whom the property is entrusted. Even if the loss occurs after the entrustment of the property has terminated, the exclusion still applies so long as there is a ‘causal connection between the act of entrustment and the resulting loss.’” Id. (quoting Bainbridge, Inc. v. Calfarm Ins. Co., 2004 WL 2650892, at *6 (Cal.Ct.App.2004)).

1 Bita contends that the Entrustment Exclusion does not apply because there is no
 2 admissible evidence that Sorrento damaged the property and that the State Court
 3 Judgment of May 25, 2012 terminated the lease and that Bita was simply seeking to
 4 regain possession. The difficulty with these arguments is that the damages to business
 5 personal property and fixtures were indisputably subject to vandalism and theft by
 6 Sorrento or its agents.⁸ While the tenancy of Sorrento appears to have been terminated
 7 on May 25, 2012, there remains the “causal connection between the act of entrustment
 8 and the resulting loss.” Id. That is, the damage to the property was caused by Bita’s
 9 lessee. Furthermore, in its lease with Soapy Joe’s, Bita explicitly required Soapy Joe’s
 10 to acknowledge that the “prior tenant removed certain improvements, equipment and
 11 fixtures from the Premises.” (Exh. 11, § 2.2).

12 Under these circumstances, the court concludes that the Entrustment Exclusion
 13 bars Bita’s property damages claim. The evidentiary record shows that Eco
 14 Construction principal Leonard Whatley personally observed property being removed
 15 by Sorrento. Sorrento also informed Whatley that he could remove the air conditioning
 16 units in partial payment of monies owed to Eco Construction. Soapy Joe’s contractor
 17 Riad Cody also testified that he was also informed by Bita’s agent that the former
 18 tenant was responsible for the property damage. Furthermore, as set forth above, there
 19 is substantial evidence establishing that Sorrento and its agents were the parties
 20 responsible for the damages caused to the property. As such, Bita’s claims are barred
 21 by the Entrustment Exclusion.

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28 ⁸ The evidentiary challenges by Bita are discussed in the previous section.

1 In sum, the court grants summary judgment in favor of Nationwide and against
2 Bita on its breach of contract claim. The Clerk of Court is instructed to enter judgment
3 in favor of Nationwide and against Bita and to close the file.

4 **IT IS SO ORDERED.**

5 DATED: February 3, 2015


6 Hon. Jeffrey T. Miller
7 United States District Judge

8 cc: All parties

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